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Affirmative Action and the Marginalized Population: A Study on the Creamy Layer and its Relevance Today

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Abstract

The creamy layer is examined to identify and prove that the reservations meant for equality, actually reeks of inequality. The author has used standards to determine the relevance of this creamy layer. An attempt has been made to rationalize the exclusion of this layer from reservation, with possible inefficiencies of doing the same. The paper examines the position of law on its exclusion. Three broad submissions have been made about the position of law. First, the creamy layer must be excluded from reservations at the entry level and in promotions. Second, currently the exclusion is applicable only to OBCs and not SC/STs. Third, the creamy layer exclusion should be applicable even for SC/ST reservation in light of M. Nagaraj case which treats the differentiation in the Indra Sawhney case as obiter. The reservation policy based solely on caste has a counterintuitive effect. Those who reap its benefits are often part of the uppermost echelons of society. This paper argues that it is crucial to identify the cause of such fallacious results in reservation. Using the doctrine of classification, this paper argues that the intelligible differentia for such exclusion is economic status, which is inextricably linked to social standing. This

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ensures that only those not empowered reap the benefits of reservations. This has a rational nexus with the already empowered creamy layer sub-class. This paper contends that the exclusion of this layer from reservations would prove fruitful to achieving the empowerment objective of reservations. Although economic classification was never considered important for social differentiation, the framers of the constitution envisaged economic backwardness within the social framework. This forms a strong justification for excluding the creamy layer from reservations.

Keywords: Caste, Creamy layer, Equality, Intelligible Differentia, Reservation.

I. Introduction

In order, therefore, to have real equality and not theoretical or formal equality it was, in view of the Constitution, necessary to make special provision for the backward classes, the Scheduled Castes and the Scheduled Tribes. It must, however, be not forgotten that the backwardness, social and educational, is ultimately and primarily due to poverty.¹

The idea of positive affirmation was given a major thrust in independent India through Articles 15(4), 15(5), 16(4), 16(4A), 16(4B), 330 and 332 of the Constitution of India. However, it would be incorrect to assume that such positive affirmation through reservations was introduced by the Constitution. As early as 1902, the King of Kolhapur – Chatrapati Sahuji Maharaj, introduced reservation to favor backward classes in state administration.² The basis of this reservation was more on the lines of economic status than purely on caste lines.³ While the need for reservations as a

¹M.R. Balaji v. State of Mysore, AIR 1963 SC 649.

²Veronique Benei, *Reappropriating Colonial Documents in Kolhapur (Maharashtra): Variations on a Nationalist Theme*, 33(4), MODERN ASIAN STUDIES, 913, 925 (October 1 1999).

³*Id.*

strategy to uplift the downtrodden sections of society has been justified for years on end, the biggest problem identified is its implementation as a policy. Though it is meant to be a socio-economic⁴ classification of people who are presumably weaker than the rest of society, it has been misused by the upper echelons of this differentiated section to gain various advantages. There lives a dual society even within the reserved category, “a tiny elite gobbling up the benefits and the darker layers sleeping distance away from the special concessions”.⁵

Reservations are supposed to provide some amount of leverage to the historically oppressed, to compete with the more advanced sections of society⁶ for representation or education. But its benefits are “snatched away by the top creamy layer”.⁷ The weakest of the weak sections of the society are left without any access to welfare. This is inherently problematic because the real cause for backwardness is economic backwardness⁸ or poverty. After all, reservations are a breach of the right to equality guaranteed by the constitution and to effectuate such a positive breach, the “heady upper berth occupants from backward classes⁹” must not be permitted to do double injury. This double injury arises first to the weakest of the weak and second to the unreserved classes who see the sacrifice of their merit go to waste.

Post economic liberalization, caste as the basis for social standing is no longer as pervasive or widespread as it was during the periods of disastrous caste based oppression.¹⁰ With changing notions of superiority, the reservation policy based solely on caste (social

⁴SUKHDEV KHANNA, RESERVATIONS AND ITS IMPLICATIONS, 9 (Jain Law Agency, 1994).

⁵State of Kerala v. N.M. Thomas, AIR 1976 SC 490.

⁶Padmraj Samarendra v. State of Bihar, AIR 1979 Pat 266.

⁷*Supra* note 5.

⁸Padmraj Samarendra v. State of Bihar, AIR 1979 Pat 266 ;Indra Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299; State of Jammu and Kashmir v. T.N. Khosa, AIR 1974 SC 1.

⁹State of Kerala v. N.M. Thomas, AIR 1976 SC 490.

¹⁰M.N. SRINIVAS, SOCIAL CHANGE IN MODERN INDIA, 172-190 (Orient Blackswan, 1st ed., 1995).

basis) has a counterintuitive effect. Those who reap the benefits of the positive affirmation are often part of the uppermost echelons of society, according to their economic status and not caste. Therefore, it is crucial to identify the people, leading to counterintuitive results in reservation.

The Supreme Court has tried to defend the idea of excluding the creamy layer through the doctrine of classification.¹¹ According to this principle, a classification is reasonable if it satisfies two conditions. First, there must be an intelligible differentia in the class sought to be differentiated. Second, such a differentia must have a rational nexus with the object sought to be achieved by the statute or executive order. Recently, it was agreed that the object must be a reasonable object.¹² In *State of Kerala v. N.M. Thomas*¹³, it was made explicit that if an intelligible differentia which separated a group within a class from the rest did exist and that differentia had nexus with the object of the classification, there could be no objection to a further classification within a class.

It is argued in this paper that the intelligible differentia that creates a class within a class, is the economic status, which in modern times is inextricably linked to social standing. Therefore, the empowered creamy layer ought to be excluded from reservations since these individuals are already part of the upper sections of social hierarchy. The objective of this exclusion would be to ensure that it is only those who are not empowered reap the benefits of reservations. This has a rational nexus with the exclusion of the already empowered creamy layer sub-class. Therefore, it is contended that the exclusion of this layer from reservations would prove fruitful in achieving the main objective of reservations.

¹¹ *State of Kerala v. N.M. Thomas*, AIR 1976 SC 490.

¹² *Pramati Educational & Cultural Trust v. Union of India*, (2014) 8 SCC 1.

¹³ *State of Kerala v. N.M. Thomas*, AIR 1976 SC 490.

II. The Creamy Layer as an Intelligible Differentia

The exclusion of creamy layer from the beneficiaries of reservations is a constitutional requirement to be honored by the Central and State Governments.¹⁴

According to Justice Krishna Iyer,¹⁵ the danger of reservation is threefold. Firstly, its benefits are snatched away by the topmost creamy layer. Secondly, this section exaggerates its claim against historical oppression to “wear the weaker section label” as a means to score over near equals, who are formally categorized as upper brackets. Thirdly, the creamy layer has a vested interest in perpetuating its backward position to obtain the benefits of positive affirmation. Amongst Harijans, one of the most backward classes in India, research has led courts to posit that a dual society exists within this class.¹⁶ The presence of a tiny elite gobbling up the benefits and the darker layers sleeping distance away from the special concessions¹⁷ shows the true state of affairs. This tiny elite is referred to as the creamy layer.

Even though equality is a fundamental right, discrimination is the essence of classification.¹⁸ However, if the discrimination rests on an unreasonable basis, then the right to equality is violated. In the Indian Constitution, those who are placed in similar circumstances are entitled to equal treatment. Fundamentally, classification is founded on substantial differences which “distinguish persons grouped together from those left out of the groups¹⁹”. Such differences must have a rational, just relation, to the object sought. Classification within the class is permissible, but must satisfy the two main tenets of the doctrine of classification. Before examining the intelligible differentia and rational nexus relevant to the creamy layer, it is crucial to understand its origin.

¹⁴Indra Sawhney v. Union of India, (1992) Supp. (3) SCC 217.

¹⁵State of Kerala v. N.M. Thomas, AIR 1976 SC 490.

¹⁶State of Kerala v. N.M. Thomas, AIR 1976 SC 490; Padmraj Samarendra v. State of Bihar, AIR 1979 Pat 266.

¹⁷Padmraj Samarendra v. State of Bihar, AIR 1979 Pat 266.

¹⁸State of Kerala v. N.M. Thomas, AIR 1976 SC 490.

¹⁹State of Kerala v. N.M. Thomas, AIR 1976 SC 490.

Popular perception places the origin of the creamy layer to *Indra Sawhney v. Union of India*.²⁰ On the contrary, Justice Krishna Iyer made the first meaningful reference to the concept in the Supreme Court while in *State of Kerala v. N.M. Thomas*²¹ nearly sixteen years earlier. He observed that “benefits of the reservation shall be snatched away by the top creamy layer of the backward class, thus leaving the weakest among the weak and leaving the fortunate layers to consume the whole cake²²”. The term was reiterated in *Akhil Bhartiya Soshit Karamchari Sangh v. Union of India*²³ and *K.C. Vasanth Kumar v. State of Karnataka*²⁴. The concept however, is rooted to *K.S. Jayashree v. State of Kerala*²⁵ where backward classes whose family income exceeded Rs.10,000 (Ten thousand Rupees) were denied the benefits of reservation.

The most important questions pertaining to the creamy layer were answered post the Mandal Commission report in the *Kerala Creamy Layer case*²⁶. Kerala passed an enactment that provided for reservations against the recommendations of the commission, by not excluding the creamy layer of the backward classes from the benefits of this reservation. The judgment made it explicit that the creamy layer must be excluded from the purview of reservation. Once a member of a backward class reaches an advanced level of social status, he is no longer to be considered a backward class and must be weeded out. This is because backward class is characterized as being of low social standing, and permitting those who have been uplifted to take advantage of the system, to reach the top of the hierarchy, is unfair. A class would be compact and truly backward only after excluding the creamy layer, failing which the truly backward will not be identified and shall not benefit.

The intelligible differentia that permits the creation of a class within a class is economic status. In modern times, economic status is

²⁰*Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217.

²¹ *State of Kerala v. N.M. Thomas*, AIR 1976 SC 490.

²² *Id.*

²³ *Akhil Bhartiya Soshit Karamchari Sangh v. Union of India*, AIR 1996 SC 3534.

²⁴ *K.C. Vasanth Kumar v. State of Karnataka*, AIR 1985 SC 1495.

²⁵ *K.S. Jayashree v. State of Kerala*, AIR 1976 SC 2381.

²⁶ *Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217.

inextricably linked to social standing. Economic might is seen as a sign of superiority. Marriage advertisements now emphasize the need for sound finances. Money is a sign of success and empowerment. The use of reservations to get empowered is justified. However, its persistent use, post empowerment is not. The creamy layer is an empowered part of the oppressed class. It ought to be excluded from reservations since these individuals are already part of the upper sections of social hierarchy. This exclusion would ensure that only those who are not empowered reap the benefits of reservations. The exclusion of this empowered sub-class has a rational nexus with the object of uplifting the most downtrodden.

III. The Position of Law

The most contentious issue before the Supreme Court in the recent case of *Ashok Kumar Thakur v. Union of India*²⁷ was that of the creamy layer. The conflict was between the English and Hindi version of the Reservation Act passed by the Parliament, the English version of which did not exclude the creamy layer from the purview of reservation, but the Hindi version did. In the Parliament, the Hindi version was rejected and the English version was passed. Clearly, the intention was to include the creamy layer within the purview of reservation. Various interest groups within politics continue to ensure that the elite from the lower class have a perpetual hold on reservations. A Coram of nine judges of the Supreme Court observed that:

The backward class under Art. 16(4) means the class which has no element of creamy layer in it. It is mandatory under Art. 16(4) that the state must identify the creamy layer in a backward class and thereafter, excluding the creamy layer, extend the benefit of reservation to the class which remains after such exclusion.²⁸

²⁷ *Ashok Kumar Thakur v. Union of India*, (2008) 6 SCC 1.

²⁸ *Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217.

The ratio of the above case pertains to the creamy layer in public employment. However, the principle is applicable to educational institutions, as in Ashok Kumar Thakur's case. There, the Union of India contended that the objective of reservation made under Article 15 is different from that under Article 16. The purpose of the former article was argued to be neither poverty alleviation nor unemployment eradication nor even backward class education. Since its purpose was to bring equality among castes, it was argued that a deprivation of opportunities to the lower caste in the name of the creamy layer would frustrate the objective of reservations, which was equality with respect to status, facilities and opportunities. However, the Union failed to understand, that in a society where economic status is inextricably linked to social status, it would be more unjust to empower the already empowered. As per Chief Justice K.G. Balakrishnan, if the creamy layer were not excluded, OBCs would be identified only on caste basis, violating Articles 15(1) and 16(1). Special benefits ought not to be perpetually extended to those who have already attained their desired impact, as it would be unreasonable, arbitrary and result in reverse discrimination. Economically was included in the social aspect of socially and educationally backward. However, the word 'educationally' was added in Article 15 as opposed to 'economically' only to maintain symmetry with Article 340. The Constitution makers indeed intended to exclude the creamy layer from reservations *ab initio*. Since unequal persons are treated as equal, the inclusion of creamy layer in reservations is inherently against Articles 14, 15 and 16. Unfortunately, when the Supreme Court was considering its applicability to Schedule Castes and Schedule Tribes, it held that the creamy layer is a parameter to identify backward classes and therefore, this cannot extend to SCs and STs which are separate classes themselves.²⁹

This decision is rather contentious, given the number of judgments differing on the same point.³⁰ Each of these judgments follow the

²⁹Indra Sawhney v. Union of India, (1992) Supp. (3) SCC 217.

³⁰ M. Nagaraj v. Union of India, AIR 2007 SC 71; State of Bihar v. Sushil Kumar Singh, (2015) 3 PLJR 593; U.P. Board Corporation Ltd. v. Rajesh Kumar, (2012) 7 SCC 1 ;SurajBhan Meena v. State of Rajasthan, (2011) 1 SCC 467.

rationale given in *Nagaraj's case*,³¹ which clearly demarcates that reservations have been extended to SCs and STs for over 65 years. It would be expected that certain sections of these SCs and STs would also have advanced forward socially and economically. It would be a futile attempt to exclude the creamy layer from the OBCs but not the SC/STs. Hence, it is clear that an acceptance exists that the creamy layer needs to be excluded from reservations. The Supreme Court, in *Indra Sawhney* decided that the creamy layer exclusion should be extended only to OBCs. While such a distinction is made explicit in the case of OBCs, this decision is treated as obiter dictum. The more recent position of law rationalizes that the creamy layer from the SCs and STs also needs to be excluded from reservations to ensure equality. This applies to reservations in the Government, Public Sector and autonomous bodies.³² The creamy layer exclusion should not only be applied at the entry level but even at the level of promotions to ensure that reservations are not misused by the already empowered. The exclusion of the creamy layer is part of the Constitutional code³³ that legislators must take cognizance of.

IV. Standards of Exclusion and Problems

The category of people to whom the creamy layer exclusion will apply, cannot be identified in an undefined manner. Therefore, the people identified include, sons and daughters of (a) the President of India, (b) the Vice President, (c) Judges of the Supreme Courts and High Courts, (d) Chairman and Members of UPSC, CAG and Chief Election Commissioner, (e) Persons holding constitutional positions of like nature. Besides this, the exclusion applies to the progeny of class I Services officers, certain Armed Forces Personnel, certain professionals and property owners.

The most important test of exclusion however, is the income or wealth test. Here, progeny of [a] persons having gross income of

³¹ M. Nagaraj v. Union of India, AIR 2007 SC 71.

³² *Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217.

³³ *State of Kerala v. N.M. Thomas*, AIR 1976 SC 490.

₹1,00,000/- or above and/or possessing wealth above the limit prescribed under the Wealth Tax Act for 3 years and [b] persons who have income from sources of wealth which will bring them within the criteria mentioned in [a], are to be excluded from the reservation. Given the fact that a well-defined criterion for differentiation is identifiable, it is only pragmatic to garner support for its implementation. However, the cost of this exclusion to the nation has been considerable. With each Government coming up with its own criteria to determine the creamy layer, a continuum of court cases that focus on this issue have come to exist. Besides the undue litigation costs, even states such as Kerala, where experts have determined a creamy layer does not exist, have been forced³⁴ to find one or be liable for contempt of court.

Currently, the exclusion of the creamy layer from reservations has not been rigorously enforced, since bribery and corruption exist in the system of seeking employment for one's children.³⁵ An added source of black income accrues to local level officials from the sale of fake certificates. The current system is still a farce that permits the elite to appear as the patrons of the oppressed, despite the fact that it deprives the oppressed of mass education and resource access. In any case, full-scale political and socio-economic transformation is always seen as an ideal to attain. However, empowerment must only be given to those who are not empowered.

V. Conclusion

The aim of excluding the creamy layer sub-class is to promote equality among equals, and it is only natural that the so called unequal will contest the policy decisions. Unfortunately, these individuals are inevitably part of the influential class of society because of which they play a role in maintaining the status quo of non-exclusion in reservations. Another issue is the fact that economic basis was never considered as important as social basis for reservations. The paper however, shows that the framers of our

³⁴ State of Kerala v. N.M. Thomas, AIR 1976 SC 490.

³⁵ R.K. Sabharwal v. State of Punjab, AIR 1995 SC 1371.

constitution envisaged a situation where economic basis was within the framework of the social aspects. In modern times, the status that comes with economic prowess is inextricably linked to the status that is sought to be gifted through reservations. It is this broad link that forms the strongest justification for excluding the creamy layer from reservations.

While the Supreme Court has said that the exclusion of the creamy layer is imperative to identify the truly socially, educationally and economically backward, it is superseded by the Government's inaction in targeted reservations. The concept should be extended uniformly to all recipients of reservations irrespective of whether it is under Articles 14, 15 or 16, particularly because, all these articles need to be read as a whole.³⁶ The State is conferred with the power to make reservations under Article 16(4) not only for cases of appointment but also for instances of promotion. "It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration."³⁷ However, this results in the Government sacrificing merit in order to promote the supposed empowerment through reservations, which in essence is counterintuitive for it is in actuality promoting the already empowered i.e. the creamy layer. Although the claims of the backward class have to be in support of the maintenance of administrative efficiency, there must not be a presumption that the lowest of the lower castes are inefficient. A warning signal was sounded by the Supreme Court in *T.N. Khosa's* case that we must not evolve "a theory of classification which may subvert, perhaps submerge, the precious guarantee of equality."³⁸ Hence, the case rests in favor of excluding only the creamy layer from the purview of reservation, not the entire system of reservations itself.

³⁶ M.P. Jain, *INDIAN CONSTITUTIONAL LAW*, 900 (5th ed., 2008).

³⁷ *General Manager, Southern Railways v. Rangachari*, (1970) 2 LLJ 289 SC.

³⁸ *State of Jammu and Kashmir v. T.N. Khosa*, AIR 1974 SC 1.